***United States Court of Appeals***

***for the Second Circuit***

# SUPPLEMENTAL BRIEF

75-7256

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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S. WILLIAM GREEN, et al.,

Plaintiffs-Appellants,

-against-

SANTA FE INDUSTRIES, INC., et al.,

Defendants-Appellees.

75-7256

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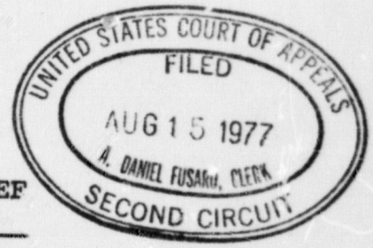


PLAINTIFFS-APPELLANTS' REPLY BRIEF
ON REARGUMENT

LEVENTRITT, LEWITTES & BENDER
CHRYSLER BUILDING
NEW YORK, N.Y. 10017
Attorneys for Plaintiffs-Appellants
(212) 986-4080

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PLAINTIFFS-APPELLANTS' REPLY BRIEF
ON REARGUMENT

1. Defendants acquiesce sub silentio in plaintiffs' contention that the judgment of the district court must in any event be reversed or modified because the district court erroneously dismissed the state claim for supposed lack of jurisdiction when federal diversity jurisdiction clearly attached (p.1 of our May 6th letter). Since the district court's judgment must be reversed or modified in any event, 28 USC §2106, ignored by the defendants, provides that the Court of Appeals "may remand the cause and direct the entry of such appropriate judgment, decree or order or require such further proceedings to be had as may be just under the circumstances." The authorities hold, therefore, that in reversing or modifying a district court judgment, this Court is empowered to grant plaintiffs leave to amend their complaint. Linn v. United, 383 U.S. 53; Colonial Sand v. Muscelli, 151 F2d 884 (2d Cir. 1945); Young Rubber Corp. v. Lee, 45 F2d 103 (2d Cir., 1930); Mauro v. Packard Motor Car Co., 215 F2d. 590 (3d Cir., 1954); Freitag v. The Stand, 205 F2d 778 (3d Cir., 1953); U.S. Cartridge Co. v. Powell, 186 F2d. 611 (8th Cir., 1951); U.S. v. Warner, 211 F2d 669 (7th Cir., 1954); Cooper v. Lish, 318 F2d 262 (D.C. Cir. 1963) and Marranzano v. Riggs Nat'l

Bank, 184 F2d 349 (D.C. Cir. 1950).

Moreover, the Supreme Court in its opinion, reversing the Court of Appeals decision and remanding for action not inconsistent therewith, has given the lead as to the appropriate remand by the Court of Appeals to the district court; for the Supreme Court stated expressly that the fraud alleged by the plaintiffs should be remedied via a state claim; and it is a state claim of this kind that the plaintiffs wish to assert by amendment of the complaint. The defendants have simply ignored the pertinence of the Supreme Court's opinion to the request of the plaintiffs in this connection.

Plaintiffs are simply requesting a direction to the district court to give plaintiffs leave to amend their complaint. Defendants would be free, inter alia, to move against the amended complaint. The district court would initially decide such a motion to dismiss.

2. Defendants completely overlook plaintiffs' Martin Act authority of People v. Concord Fabrics, Inc. (cited at p.2 of our May 6th letter). The New York State Courts held that lack of business purpose by itself is fraud under the Martin Act in a long form merger. The facts here are a fortiori, since there was a short form merger without business purpose plus a blatant, unilateral undervaluation of the minority shares in a forced purchase. Of course, the forced sale, under the above circumstances,

without notice, provides the necessary causal connection (Vine v. Beneficial Finance Co., 374 F2d 627 (2nd Cir.). Even though plaintiffs did not tender their shares, they are still deemed to be sellers in a forced sale (Vine, supra). Arguendo, the forced purchase without notice at a deliberately inadequate price of $150 per share to the minority, where the majority knows the value to be greatly in excess of $700 per share, constitutes a fraud. The Supreme Court in Santa Fe v. Green did not hold to the contrary. Clearly the Martin Act covers this kind of fraud (People v. Concord Fabrics, Inc., supra).

3. Arguendo, contra defendants (p.6), even if the New York State courts applied the Delaware law on breach of fiduciary duty, those courts would hold that the facts here spell out a blatant fraud which is actionable under Delaware law (pp. 5-6 of our May 6th letter).

4. With respect to plaintiffs' claim under §7303 of the Delaware Securities Act. This is identical to S.E.C. Rule 10b-5, which on its face covers fraud, unlike Section 10-b which the Supreme Court in Santa Fe v. Green limited to a narrow conception of "manipulation" or "deception". However, §7303, like Rule 10b-5, clearly covers fraud. Like Schoenbaum v. Firstbrook, 405 F2d 200 (2nd Cir., en banc), the facts here spell out a fraud and fraud is actionable under §7303 of the Delaware Securities Act. The Supreme Court in Santa Fe was principally relegating plaintiffs to their state remedies, not cutting the same off.

5. Defendants contend (p.7) that plaintiffs must establish a causal connection between a material misrepresentation or omission and the damage which he sustained. In a short form merger, without notice, where there is a forced sale, there is no such requirement, since plaintiffs are deemed to have sold their shares on the date of the short form merger, even though their shares were not later tendered (Vine, supra). In any event, on remand, plaintiffs intend to add plaintiffs who did tender their shares (as defendants concede (p.8) has been done in the New York State action instituted by plaintiffs under the Martin Act).

6. Defendants fail (p.9) to rebut plaintiffs' arguments (pp. 5-6 of our letter of May 6th) that, on the facts here, appraisal is not the exclusive remedy under Delaware law.

7. The fact that plaintiffs have instituted a claim under the Martin Act in the New York State courts does not preclude plaintiffs from asserting the same claim in the federal court where plaintiffs already have jurisdiction established. Defendant Santa Fe may attack the jurisdiction of the state courts. In addition, it may be far more efficient to handle all of plaintiffs' claims in the federal court.

## CONCLUSION

The relief requested in plaintiffs' letter of May 6th should be granted in all respects.

Respectfully submitted,

LEVENTRITT LEWITTES & BENDER
Attorneys for plaintiffs-appellants
405 Lexington Avenue
New York, N.Y. 10017

Tel. (212) 986-4080

Of Counsel:

Sidney Bender
Aaron Lewittes